U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 22-0486 BLA

ESTHER S. HATCHER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 08/28/2024
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits in an Initial Claim of Larry S. Merck, Administrative Law Judge, United State Department of Labor.

Joseph Wolfe and Cameron Blair (Wolfe, Williams & Reynolds), Norton, Virginia, for Claimant.

Jeffrey S. Goldberg (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Jennifer Feldman Jones, Deputy Associate Solicitor; Andrea J. Appel, Counsel for Administrative Appeals), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: GRESH, Chief Administrative Appeals Judge, BUZZARD and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits in an Initial Claim (2020-BLA-05773) of Administrative Law Judge (ALJ) Larry S. Merck rendered on a claim filed on May 10, 2017, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found that Claimant's independent contractor jobs as an inspector for the United States Department of the Interior, Office of Surface Mining Reclamation and Enforcement (OSM/DOI), and for Aenviorans Engineering were not coal mine employment. In addition, the ALJ stated he was unable to determine the length of time Claimant worked as a miner for Mistletoe Energy Corporation/Gabriel Energy (Mistletoe Energy).[1] Consequently, the ALJ found Claimant had no coal mine employment and therefore is not entitled to benefits under the Act.

On appeal, Claimant argues the ALJ erred in finding she has no coal mine employment. Claimant further contends that she is entitled to a supplemental report from Dr. Nader, the physician who performed the complete pulmonary evaluation sponsored by the Department of Labor, because he had an incorrect understanding of the length of her coal mine employment.

The Director, Office of Workers' Compensation Programs (the Director), responds, asserting the ALJ properly found Claimant's work with OSM/DOI and Aenviorans Engineering was not coal mine employment, but erred in not crediting Claimant with any coal mine employment for her supervisory work with Mistletoe Energy. Thus, the Director requests that the Benefits Review Board remand the case to the ALJ for further consideration of Claimant's length of coal mine employment with Mistletoe Energy. The Director did not address Claimant's request for a supplemental report from Dr. Nader.

The Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[2] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359, 361-62 (1965).

Definition of a Miner

A "miner" is "any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal." 30 U.S.C. §902(d). Thus,

[1] Claimant lists work for Mistletoe Energy and Gabriel Energy as two separate companies on her Employment History Form. Director's Exhibit 3. However, during the hearing, she testified that "[i]t was Mistletoe/Gabriel Energy." Hearing Transcript at 15. We thus refer to it as one entity, as did the ALJ. Decision and Order at 14-16.

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because Claimant performed her employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 4-5 & n.6; Director's Exhibit 20.

a claimant's duties must meet situs and function requirements to qualify as a miner under the Act. *See Navistar, Inc. v. Forester*, 767 F.3d 638, 641 (6th Cir. 2014); *Falcon Coal Co. v. Clemons*, 873 F.2d 916, 922 (6th Cir. 1989); *Director, OWCP v. Consol. Coal Co.* [*Petracca*], 884 F.2d 926, 929-30 (6th Cir. 1989). Under the situs requirement, the work must take place in or around a coal mine or coal preparation facility; under the function requirement, the work must be integral or necessary to the extraction or preparation of coal. *Id.*

The regulations establish "a rebuttable presumption that any person working in or around a coal mine or coal preparation facility is a miner." 20 C.F.R. §725.202(a); *see* 20 C.F.R. §725.101(a)(19). Thus, when a claimant establishes the situs requirement (working in or around a coal mine), her work is presumed to meet the function requirement (integral or necessary to the extraction of coal). *Forester*, 767 F.3d at 641. The burden then shifts to the party opposing entitlement to defeat the claimant's "miner" status with proof that she (the claimant) either was not engaged in the extraction of coal or was not "regularly" employed in or around a coal mine. *Id.*; *see* 20 C.F.R. §725.202(a).

OSM/DOI

The ALJ found that Claimant's contract work for OSM/DOI as an inspector was not coal mine employment. Decision and Order at 11-12. Relying on *Forester*, 767 F.3d at 645-47, and *Spatafore v. Consolidation Coal Co.*, 25 BLR 1-179, 1-188 (2016), he determined Claimant performed regulatory duties, similar to a federal or state government mine inspector, and thus did not work as a miner. *Id.* at 12.

Claimant argues the ALJ erred in extending the holdings in *Forester* and *Spatafore* to this case because she was an independent contractor, not an actual government employee. Claimant's Brief at 13-15. However, as the Director accurately notes, the issue is not whether Claimant is a government employee or a self-employed contractor, but whether the work she performed as a contractor was regulatory in nature or integral to the extraction or preparation of coal. Director's Brief at 7. Thus, regardless of the fact that Claimant worked as a contractor rather than a direct government employee, the ALJ's finding that her inspection work in this position did not meet the function test is supported by substantial evidence and consistent with law. Decision and Order at 12.

In *Spatafore*, the Board held that a claimant who provided safety training at mine sites while employed by the state of West of Virginia was not a miner because the purpose of his work was ensuring compliance with government safety standards, not extracting or producing coal. *Spatafore*, 25 BLR at 1-188. The Board reasoned, "Although compliance with government safety standards may yield better health among miners and safer conditions at mines, and those improvements may in turn yield benefits in coal extraction and preparation, the benefits in coal production are secondary and incidental to the

government agency's purpose." *Id*. at 1-187. It thus held that "individuals who work at coal mines *on behalf of* federal or state agencies not charged with the function of extracting, preparing, or transporting coal . . . do not perform work integral or necessary to the extraction or preparation of coal, and therefore do not work as 'miners' under the Act." *Id*. at 1-188 (emphasis added). So too here.

Claimant worked at abandoned mine sites on behalf of the federal government performing work the ALJ found was purely regulatory in nature. Director's Exhibits 3-5; Claimant's Exhibit 2. He determined:

> Claimant was working in the capacity of an "inspector," a purely regulatory function, and was "not charged with the function of extracting, preparing, or transporting coal, or performing coal mine construction." *Spatafore*, *supra* at 188; slip op. at 9. As Claimant described, her duties were to observe, monitor, and document the work done by reclamation contractors to ensure it was completed in compliance with OSM specifications.

Decision and Order at 12.[3] Because it is supported by substantial evidence, we affirm the ALJ's finding that Claimant was not a miner while working as a contract inspector and she therefore did not establish coal mine employment with OSM/DOI. 20 C.F.R. §725.202; *see Forester*, 767 F.3d at 641; *Clemons*, 873 F.2d at 922; *Petracca*, 884 F.2d at 929-30.

Aenviorans Engineering

We also affirm the ALJ's finding that Claimant's reclamation inspection work with Aenviorans Engineering at abandoned mines for the state of Kentucky's Abandoned Mines Lands Agency was not the work of a miner. Decision and Order at 13. Although Claimant generally contends her work was coal mine employment, we agree with the

[3] On her Employment History form (Form CM-911a), Claimant described this work as observing, photographing, videotaping, and writing daily and weekly summaries of the reclamation work performed by other independent federal government contractors at abandoned strip mines. Director's Exhibit 3. She reiterated that description of her work in her Description of Coal Mine Work forms she completed. Director's Exhibits 4, 5. At the hearing, she further described her work as observing and documenting the daily mining reclamation activities of other federal government contractors; writing daily, weekly, and final reports; and taking videotapes and photographs of the reclamation activity. Hearing Transcript at 17-19, 25, 29, 38-39. Moreover, Ms. Demorest, a former contracting officer for the OSM/DOI, supported Claimant's description of her work by describing it as inspecting the daily operations of reclamation work at abandoned coal mines. Claimant's Exhibit 2.

Director's position that she "does not explain how her work meets the function prong of the situs-function test." Director's Brief at 8. The ALJ found that Claimant's work was regulatory in nature. Decision and Order at 13. Because Claimant does not identify any specific error with that finding, we affirm it. *See Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); Claimant's Brief at 1, 3, 9; Hearing Transcript at 16-17, 35-37.

Mistletoe Energy

The ALJ found part of Claimant's work with Mistletoe Energy as an office manager did not qualify as coal mine employment because it was clerical in nature. Decision and Order at 15-16. We affirm that finding as it is supported by substantial evidence, including Claimant's specific testimony that her job involved "keep[ing] track of expenses and taxes in ledgers." Hearing Transcript at 34-35; *see Clemons*, 873 F.2d at 921; Decision and Order at 15-16; Claimant's Brief at 22-23; Director's Exhibit 37 at 2.

On the other hand, the ALJ found Claimant's position as a supervisor at Mistletoe Energy satisfied the situs and function tests because she operated the loader and dispatched trucks at strip mines. Decision and Order at 15; Director's Exhibit 37 at 2. We affirm that finding as it is unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR1-710, 1-711 (1983). Nonetheless, the ALJ credited Claimant with no coal mine employment with Mistletoe Energy because he stated he was unable to calculate how long Claimant worked as a supervisor.[4] Decision and Order at 15-16.

As the Director accurately points out, Claimant stated she worked at Mistletoe Energy for two years, and her Social Security Earnings Record (SSER) corroborates that fact, itemizing earnings with Mistletoe Energy from 1981 and 1982. *See* Director's Brief at 9; Director's Exhibits 20; 37 at 2. Based on Claimant's uncontradicted statement that she worked as a supervisor the year after she was hired at Mistletoe Energy, and her SSER at a minimum reflects she earned $3,700 in her second year of employment there, the ALJ erred in stating that Claimant's length of coal mine employment with Mistletoe Energy was

[4] Claimant argues the ALJ should have found forty weeks, or at least 1.6 years of coal mine employment, with Mistletoe Energy based on the Director's alleged concession to this fact. Claimant's Brief at 22-23 (citing Director's Post-Hearing Brief at 2); Director's Exhibit 20. The Director asserts it conceded only that Mistletoe Energy employed Claimant for forty weeks but did not stipulate that she worked as a miner or that it was forty weeks of coal mine employment. Director's Brief at 9 & n.4; Director's Post-Hearing Brief at 2.

indeterminable. *See* Director's Exhibits 20; 37 at 2; Hearing Transcript at 35. We therefore vacate the ALJ's finding and remand the case for the ALJ to determine the length of Claimant's supervisory work with Mistletoe Energy and credit her with such time she spent as a miner. Because the ALJ erred in finding Claimant had no coal mine employment, we further vacate the denial of benefits.

Remand Instructions

On remand, the ALJ must first determine the length of Claimant's coal mine employment as a supervisor for Mistletoe Energy, taking into consideration all of the relevant evidence and using any reasonable method of computation. *See* 20 C.F.R. §725.101(a)(32)(i)-(iii); *see also Shepherd v. Incoal, Inc.*, 915 F.3d 392, 400-02 (6th Cir. 2019); *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011); *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985). He must explain his findings in accordance with the Administrative Procedure Act.[5] *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). Thereafter, the ALJ must determine whether Claimant can establish entitlement to benefits under 20 C.F.R. Part 718.[6] 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204.

[5] The Administrative Procedure Act, 5 U.S.C. §§500-591, provides that every adjudicatory decision must include "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

[6] Claimant alleges she is entitled to a supplemental report from Dr. Nader that accurately reflects the length and nature of her coal mine employment history. *See* Claimant's Brief at 24-25. We disagree. Dr. Nader conducted the Department of Labor-sponsored complete pulmonary evaluation of Claimant on October 24, 2017, and indicated Claimant had a coal mine employment history of twenty-seven years. Director's Exhibit 22 at 2. The doctor performed a physical examination on Claimant, as well as a chest x-ray, pulmonary function study, and resting blood gas study (but no exercise blood gas study because it was contraindicated). He diagnosed Claimant with legal pneumoconiosis, and stated Claimant is totally disabled from a pulmonary standpoint. *Id*. at 3-4. In a supplemental report dated January 12, 2018, Dr, Nader updated his opinion based on a one-year history of coal mine employment. Director's Exhibit 27 at 1-2. He also performed repeat pulmonary function studies and, based on the results, reiterated his opinion that Claimant has legal pneumoconiosis and is totally disabled from a pulmonary standpoint, with one year of coal mine employment "in part contributing and aggravating" her

Accordingly, we affirm in part and vacate in part the ALJ's Decision and Order Denying Benefits in an Initial Claim, and we remand this case to the ALJ for further consideration consistent with this opinion.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

impairment, making it a "minor contributor" secondary to her smoking history. *Id*. Because Dr. Nader performed all of the required tests and linked his conclusions on all of the elements of entitlement to those tests, the Department of Labor satisfied its obligation to provide Claimant with a complete pulmonary evaluation and thus remand is not required on this basis. *See Greene v. King James Coal Mining, Inc.*, 575 F.3d 628, 642 (6th Cir. 2009).